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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 678

AUSTIN HERSCHEL,

Petitioner,

vs.

ORLANDO W. WILSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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OPINION BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, is reported as *Herschel* v. *Dyra,* 365 F. 2d 17 (7th Cir. 1966) and is set forth in full as Appendix "A" of the Petition for Writ of Certiorari, p. 17.

QUESTION PRESENTED.

Is respondent's refusal to expunge petitioner's arrest record violative of the United States Constitution?

REASON FOR DENYING THE WRIT.

Respondent's refusal to expunge petitioner's arrest record is under authority of law and not in violation of the United States Constitution.

Petitioner treats the issue of whether respondent's refusal to expunge his arrest record is violative of the United States Constitution as a new and unusual question of law. Nothing could be further from the fact. Petitioner ignores a host of state and federal decisions which have decided this question adversely to his contention.

It is clear that respondent's action is taken pursuant to authority of Illinois law. Illinois courts have held that, absent express legislative authority to the contrary, the Superintendent of Police may retain all arrest records in the official files of the Chicago Police Department, regardless of whether or not the accused has been acquitted, discharged or otherwise released from the charges brought against him. The decision of the Circuit Court of Appeals, Seventh Circuit, merely served to codify the law as it has always existed in the state courts.

In *Kolb* v. *O'Connor,* 14 Ill. App. 2d 81, 142 N. E. 2d 818 (1957), several petitioners filed a declaratory judgment action praying for an order of the court "that they are entitled as a matter of right, justice and equity to the removal and/or return to them of such records of identification." All of these petitioners had been discharged, some of state offenses and others of municipal ordinance violations. The trial court denied the motion of the Commissioner of Police of the City of Chicago to strike the complaint. The Commissioner appealed and the Illinois Appellate Court reversed the trial court, upholding the right of the Chi-

cago Police Department to retain the identification records in question. The Court addressed itself with particularity to the issue posed by petitioner herein, stating (pp. 87-88, 91):

> "The plaintiffs also urge that they have the right, irrespective of any statutory mandate, to have the records of identification returned to them since their retention and alleged use by the Chicago police department would constitute an invasion of their right of privacy."
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> "It is necessary in cases of this kind to reach an equilibrium between conflicting rights, the right of the public to protection and the right of the individual to privacy."
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> * * * * *
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> "In the case before us the only allegation which is made with reference to the use of the records of identification is that they are kept in the files of the police department and exhibited to the victims of crimes committed in the vicinity, for the purpose of permitting them to make identification. The court takes judicial notice that the records of identification retained by the police department of the City of Chicago are not open to the general public. They are retained in the files of the police department, and the photographs therein contained are under certain circumstances exhibited to persons who have been the victims of crime, for the purpose of enabling them to make an identification."
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> * * * * *
>
> "The rights of the individual must be subordinate to the safety of the public. The question involved here is one of public policy. The legislature has not indicated what the public policy of the State should be. Without a specific mandate of the legislature ordering the return to an arrested person of all records of identification held by sheriffs or police departments we are constrained to hold that such depart-

ments may retain in their files records of identification such as were here taken for the purpose of such limited exhibition as is here involved."

In *People* v. *Lewerenz*, 42 Ill. App. 2d 410, 192 N. E. 2d 401 (1963), the Illinois Appellate Court reaffirmed the principles as set forth above in *Kolb*. In *Lewerenz*, the defendant, after being acquitted of the offense of sale of narcotics, petitioned the Criminal Court of Cook County to order Superintendent of Police Orlando W. Wilson to return his fingerprints and other identification records. The trial court so ordered, but the Illinois Appellate Court reversed the order. The basis for this reversal was twofold: (1) The Criminal Court had no jurisdiction to enter the order in question, and (2) under the *Kolb* case the Superintendent of Police may keep these identification records, even after acquittal. The Court stated unequivocally that (pp. 412-413): "We adhere to the views expressed in *Kolb* v. *O'Connor* that . . . such [police] departments may retain in their files records of identification . . . ."

The philosophy of the *Kolb* and *Lewerenz* cases are expressions of what consistently has been the public policy of the State of Illinois. *Cf. Poyer* v. *Boustead*, 3 Ill. App. 2d 562, 122 N. E. 2d 838 (1954); *Maxwell* v. *O'Connor*, 1 Ill. App. 2d 124, 117 N. E. 2d 326 (1953).

It is also clear that respondent's action is not violative of the United States Constitution. In *United States* v. *Kelly*, 55 F. 2d 67 (2nd Cir., 1932), the court refused to order Federal Prohibition Agents to return plaintiff's fingerprints taken at the time of his arrest for sale of a quart of intoxicating liquor. The Court, in rejecting plaintiff's contention that the retention of these fingerprints by the authorities violated his personal liberties, said (p. 68):

"Any restraint of the person may be burdensome. But some burdens must be borne for the good of the

community. *Crowley* v. *Christensen*, 137 U. S. at page 89, 11 S. Ct. 13, 34 L. Ed. 620; *Jacobson* v. *Massachusetts*, 197 U. S. at page 26, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Molineux* v. *Collins*, 177 N. Y. at page 399, 69 N. E. 727 L. R. A. 104. The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest."

In *State* v. *Tyndall*, 66 N. E. 2d 755 (1946 Ind.), plaintiff was acquitted of a misdemeanor. He then brought suit praying for the (p. 756) "surrender or destruction of his fingerprints, photographs and other identifying records made by city police officers at the time of his arrest." The court, in holding that the "right of privacy" does not demand the surrender or destruction of these records, stated (p. 760):

> "The right of privacy is essentially personal though some courts have labored and found that it entails a property right."
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> * * * * *
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> "Appellant really complains of publicity, the antithesis of privacy. What publicity has he already had? What more will be given if the identification data are retained? When he was arrested he was 'slated.' We assume that this included a statement on police records that he had been arrested on a certain date and charged with a certain offense. There followed entries on a court docket of the filing of an affidavit, a plea, a hearing and a judgment dismissing the charge. These records are extant. He does not ask that they be blotted or torn out of the books in which they are contained. But any one may read them for they are public records. His fingerprints, if they are to be of any value to the police, must be filed in a cabinet and indexed in such a manner that they may be found by one who is qualified to read them. So filed they tell nothing to the idle curious whose gossip might hurt his reputation. They are available and valuable only to the

expert searching for criminals and concerned enough, we may assume, to inform himself as to the court's disposition of appellant's case and the final entry of acquittal."

* * * * *

"Every person in the armed services, applicants for passports and for licenses of various kinds, employes of many large corporations, millions of persons in the United States have fingerprints in some public or private set of files. So long as they are kept there they are harmless. Accordingly, we can see no valid reason for their surrender or destruction by the police. At least none so compelling as to justify our substituting a judicial discretion for the executive discretion permitted by the absence of restrictive legislation."

See also *Hansson* v. *Harris*, 252 S. W. 2d 600 (1952 Tex.); *Voelker* v. *Tyndall*, 75 N. E. 2d 548 (1947 Ind.); *Bridges* v. *State*, 19 N. W. 2d 529 (1945 Wis.); 14 A. L. R. 2d 750, 761, 770 (1950); "The Right of Privacy", 4 Harvard Law Rev. 193 (1890); "The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs and Other Police Records," 27 Temple L. Q. 441 (1954); also Notes, 26 Boston U. L. Rev. 526 (1946); 23 Notre Dame L. Rev. 380 (1948); 21 Tulane L. Rev. 289 (1946).

These authorities all show that the retention of fingerprints and other arrest records by the police, even after the discharge, does not violate any constitutional right of an accused. *Certainly this is true in the instant case where we are not dealing with fingerprints and photographs, but merely with an arrest record (noting the dates and circumstances of the arrest).*

Petitioner overlooks one obvious purpose for the retaining of records by the Chicago Police Department. It would be impossible to check upon and document the activities of a large metropolitan police force without compiling

records of arrest of arrested persons. To purge these records of information as to particular arrests would open the door to a host of possible abuses and injustices arising from improper and incomplete record keeping.

The purposes of compiling and keeping arrest records were succinctly stated in *Miller v. Gillespie*, 163 N. W. 22 (1917 Mich.). In the *Miller* case, the court reported the facts as follows (p. 22):

> "Owing to what seems to have been either the ignorance or malice of the complaining witness, a warrant was issued by one of the police justices of the city of Detroit for the arrest of the plaintiff, upon a charge of feloniously embezzling and converting to his own use an article of personal property."
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> "It seems to be clear that he had committed no offense and that the trial ought to have been concluded with a verdict of acquittal."
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> * * * * *
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> "Plaintiff is a man of affairs, has a family, consisting of a wife and nine children, was never before arrested or charged with having violated the criminal laws."

Miller filed a bill praying that the Commissioner of Police of Detroit (p. 22) "surrender for cancellation, all statements claimed to have been made in the enforced statements from your orator, also that all references to your orator upon the books, blotters, statements, histories, and in the records or written memoranda of the police department of the city * * * be decreed to be given up for destruction to the register of this court." The trial court refused to order the Commissioner to comply with plaintiff's request and the Supreme Court of Michigan affirmed. The court, in noting the dual purpose of identification records, said (pp. 22-23):

> "It may be assumed, I think, that two purposes are

> supposed to be served by making and preserving in the police department a record such as the one in question here. There may be other reasons and purposes; but two, at least, appear to be fairly obvious ones. The responsible superior police officials are thereby furnished with definite and authoritative data of the activities of the department. This is, I assume, one purpose. The other is the preservation, for future reference and use, of the data so secured. The form of the record before us serves both purposes, and that it was intended to do so is evidenced by the form of the report. It gives information, not only that a person giving a certain name has been arrested, but information also of the personal appearance of the prisoner as well as his nationality and some of his acquirements."

The United States Court of Appeals properly concluded in the instant cause that (365 F. 2d 17, 20):

> "We think that under the obligations which the Chicago Police Department has in maintaining the public safety and welfare in Chicago, the Superintendent of Police is justified and, indeed, duty-bound to compile and retain arrest records of all persons arrested, and that the execution of that policy does not violate plaintiff's right of privacy."

Based upon lawful authority and upon the administrative obligations of the Chicago Police Department in maintaining the public safety and welfare, Respondent is justified and duty bound to compile and retain arrest records of all persons arrested. This action is not violative of any right accorded Petitioner under the United States Constitution.

CONCLUSION

Petitioner's arrest record is retained in the official files of the Chicago Police Department under authority of law. Such retention does not violate any right accorded him under the United States Constitution. The trial court properly dismissed Count II of the complaint. The Court of Appeals was correct in affirming this dismissal.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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